THE CONCLUSIVENESS OF DECREES OF DISMISSAL.

The fact that a final adjudication in favor of the defendant in chancery results in a decree that the bill be dismissed, instead of the more precise and definite language of a judgment in favor of the defendant at law, has sometimes caused uncertainty as to whether the dismissal intended amounted to a mere withdrawal of the case in its then form, or an adjudication which would prove a bar to a reopening of the issues. The opportunity for misunderstanding is, perhaps, increased by the fact that the word dismiss is in common use in reference to suits at law, to mean simply the discontinuance of a cause, with the right to begin it over again and litigate the same matters.

Where the decree is properly drawn and shows clearly the grounds on which the court acted, there is little room for doubt. In general, decrees of dismissal, with language aptly worded, because the action has been prematurely brought,[1] or for lack of jurisdiction,[2] or for want of proper parties,[3] or for merely formal or technical defects,[4] do not constitute a bar to a subsequent suit. And so, too, voluntary dismissals by the complainant, and dismissals for want of prosecution, are in general no bar, unless when entered in an advanced stage of the cause, as will be hereafter considered. And on the other hand, unqualified decrees of dismissal, which clearly show on their face an adjudication of the merits, whether on demurrer or plea, on bill and answer, or on pleadings and evidence, as obviously do constitute a bar. This must, of course, be understood subject to the usual rules in regard to identity of parties and issues, and bearing in mind that an adjudication that the complainant has no case in chancery does not necessarily deprive him of the right to sue at law, if, for example, his bill has been dismissed solely for the reason that he has an adequate remedy at law.

In the middle ground between decrees which clearly do not constitute *res adjudicata*, and decrees which clearly do, lie cer-

1 Foster *v.* *The Richard Busteed*, 100 Mass. 409.

2 Walden *v.* Bodley, 14 Pet. 160.

3 St. Romes *v.* Levee Cotton Press Co., 127 U. S. 614.

4 Gilmer *v.* Morris, 30 Fed. Rep. 476.

tain classes of decrees not so summarily to be disposed of, which it is the purpose of this article to examine, having in view the ascertainment of the law as it has been applied in various jurisdictions, rather than the reconcilement of the different authorities.

The general rule for the construction of unqualified decrees of dismissal is thus stated by Chief Justice Shaw in the case of Foote *v.* Gibbs, 1 Gray 412:

"The authorities, both in England and this country, are decisive that a general entry of 'bill dismissed,' with no words of qualification, such as 'dismissed without prejudice,' or 'without prejudice to an action at law,' or the like, is conclusively presumed to be upon the merits, and is a final determination of the controversy." To the same effect are numerous other cases, the most apposite of which are cited in the margin.[5]

With but slight exception there is a general concurrence of the authorities in this doctrine. In one case in Maryland [6] it was said that a decree of dismissal was not a bar unless it was shown that there was an absolute determination that the party had no title, and that the matter was *res adjudicata*, but the point was outside the questions actually decided, and the case cannot be considered an authority in conflict with the prevailing view.

In cases where the record discloses that the dismissal might well have been on grounds not going to the merits, some courts have been reluctant to apply the principle of presumptions in all its strictness. For example, in an Ohio case [7] where the issues had not been closed, either by setting down the plea for hearing, or by a replication, it was said that the bill might have been dismissed for want of prosecution, and that no presumption would be indulged that the merits had been passed on. The court said, however, that where it appears that the dismissal was upon a hearing of the case, it is to be inferred that it was upon the merits.

So in the case of Foster *v. The Richard Busteed*, 100 Mass. 409, where the court considered the effect of the entry "Petition

5 Durant *v.* Essex Co., 7 Wall. 107; Lyon *v.* Perin Mfg. Co., 125 U. S. 698; Bigelow *v.* Winsor, 1 Gray 299; Tankersly *v.* Pettis, 71 Ala. 179; Taylor *v.* Yarbrough, 13 Gratt. 183; Curts *v.* Bardstown, 6 J. J. Mar. 536; Kelsey *v.* Murphy, 26 Pa. St. 78; Adams *v.* Cameron, 40 Mich. 506; Burton *v.* Burton, 58 Vt. 414; Garrick *v.* Chamberlain, 97 Ill. 620; Knowlton *v.* Hanbury, 117 Ill. 471; Stickney *v.* Goudy, 132 Ill. 213; Armstead *v.* Blickman, 51 Ill. App. 470.

6 Chase's Case, 1 Bland Ch. 206, 17 Am. Dec. 277.

7 Loudenback *v.* Collins, 4 O. St. 251.

dismissed," in an action for the purpose of enforcing a lien on a vessel. The answer set up that the petition had been prematurely filed (which appeared to be a fact), and also grounds going to the merits. The court said that where in an answer several matters of defense were set forth, some of which related to the maintenance of the suit, and some to the merits, and there was a general decree of dismissal, the merits could not be assumed to have been passed on, and the decree would not be held to be a bar.

Decrees of dismissal which show on their face that the complainant consented to a dismissal on the merits,[8] and also those made because of failure of proof,[9] are considered a bar.

The proper form of the decree, and the only one which can be relied upon to put beyond the possibility of doubt its construction, where the court intends to permit a simple discontinuance of the suit, without concluding the parties on the issues, is to dismiss the bill "without prejudice." Where a bill is dismissed without prejudice, the grounds for the reservation cannot be reëxamined in another suit, and the decree is not subject to collateral attack to show that in fact the merits were involved on the hearing, and that the provision that the decree should be without prejudice was erroneous.[10]

An appeal lies, however, directly from such a decree, and if the decree should clearly have been absolute it will be reversed and ordered so modified.[11]

Where an absolute decree of dismissal has been entered, the decree may be amended on appeal so as to read without prejudice.[12]

Uncertainty is sometimes liable to arise where a decree of dismissal in chancery is pleaded to an action at law. For example, in an Ohio case[13] the court had before it a question of this sort, and held that where a demurrer for want of equity was sustained, and the decree was that the complainant was not entitled to the relief sought and that the bill be dismissed, it would not be assumed that anything but the right to equitable

8 Pelton *v.* Mott, 11 Vt. 148, 34 Am. Dec. 678; Donnelly *v.* Wilcox, 113 N. C. 408, 18 S. E. Rep. 339.

9 Cochran *v.* Couper, 2 Del. Ch. 27, McWhorter *v.* Norris (Ind. App.), 34 N. E. Rep. 854.

10 Wanzer *v.* Self, 30 O. St. 378.

11 Wanzer *v.* Self, *supra.*

12 Durant *v.* Essex Co., 7 Wall. 107, and cases cited. See Gove *v.* Lyford, 44 N. H. 525, where a motion to add "without prejudice" was denied.

13 Lore *v.* Truman, 10 O. St. 45.

relief was adjudicated, and that an action at law was not barred. And later cases in the same court [14] indicate that a decree of dismissal without qualification simply determines the right to equitable relief, and does not bar a suit at law for the same cause of action.

It is obvious, however, that a chancery suit may adjudicate not only the right to equitable relief, but particular points or the precise question which may afterwards be presented in a suit at law. A decree on the merits puts an end to all further controversy concerning the points thus decided between the parties to the suit.[15] Where the reservation of the right to sue at law, or the reason of the court's action, does not affirmatively appear from the record, there may be much difficulty in determining how far there has been an adjudication of the issues which are subsequently raised at law—a question which does not seem to have been particularly examined except in these Ohio cases, which present only one phase of it.

We come now to cases dismissed for want of prosecution, or voluntarily dismissed by the complainant. In regard to these two classes, and especially the latter class, a difference in practice between courts of law and chancery has sometimes misled the practitioner. Under the common law, as modified by the statute of 2 Hen. IV., ch. 7, a voluntary nonsuit could be taken up to the time that the jury announced its verdict, and under the practice as it exists in most of the States at the present day a nonsuit can be taken up to the time that the jury retires from the box, without creating any bar to a subsequent suit based on the same cause of action. In chancery, however, according to the weight of recent authority, a voluntary dismissal of a case cannot be entered after the cause has been set down for final hearing, without incurring the risk of the decree of dismissal operating as a conclusive adjudication of the merits, and dismissals for want of prosecution stand very much on the same footing.

There is some conflict of authority on this subject, much of it traceable to differences in the chancery rules of different jurisdictions.

Under the English chancery practice as it existed prior to 1845 there was no rule of court explicitly providing for the effect of dismissals of this character. The cases are not all in accord, but in general the doctrine prevailed that if a complainant

14 Cramer *v.* Moore, 36 O. St. 347; Porter *v.* Wagner, *ib.* 471.

15 Bank of U. S. *v.* Beverly, 1 How. 148; Smith *v.* Kernochen, 7 How. 198.

obtained leave to dismiss his bill on payment of costs, even at the hearing, and at any time up to the decree, or if the bill was dismissed at the hearing for failure of the complainant to appear, the dismissal would not operate as a bar.[16]

In the case of Pickett *v.* Loggon, 14 Ves. 232, Lord Eldon said:

"At the same time, if a party thinks proper to bring his cause to a hearing upon examination of witnesses, publication passed, and the cause capable of being opened, and then makes default, it is very difficult, and would be rather mischievous, to treat such conduct merely as a non-suit at law."

And in a case in the Irish court of chancery [17] it was held that a dismissal by the complainant at the final hearing, after publication had passed, was a bar.

Among the chancery rules adopted in England in 1845 was a rule providing that a dismissal on the plaintiff's motion or on his default, after the cause has been set down to be heard, unless the court otherwise orders, is equivalent to a dismissal on the merits, and may be pleaded as a bar.[18]

Wherever this rule has been adopted the practice is freed from considerable doubt. In at least one State, and probably in others, the rules provide that after a cause has been set down for a hearing, either party may have the cause heard on notice, and if one or the other of the parties does not attend, the cause may nevertheless be proceeded in, and such decree rendered as the right and justice of the case may require.[19]

The rules prescribed by the Supreme Court of the United States for the Federal courts of equity have no provision on the subject. It was accordingly held by Justice Clifford, that in the absence of any special rule of the circuit court, the procedure must be governed by the English practice as it existed in 1842, when the general equity rules were adopted, which practice he construed to permit a withdrawal of the case at any time before decree.[20]

The United States Supreme Court has not passed on the precise point, though two cases are instructive as to the general principles. In Lyon *v.* Perin Manufacturing Company, 125 U. S. 698, the complainant introduced evidence to show that a prior

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16 Carrington *v.* Holley, 1 Dick. 280.

17 Byrne *v.* Frere, 2 Molloy 157.

18 Ord. XXIII. 13—see 1 Dan. Ch. Pl. & Pr. (5th ed.) 659.

19 Fla. Eq. Rules 86.

20 Badger *v.* Badger, 1 Cliff. 237.

decree of dismissal was entered for failure of the complainant to appear upon the call of the case, after answer and replication had been filed, and after the time for taking testimony had expired without any testimony having been taken. The decree recited that the cause being submitted upon bill, answer and replication, the court decreed that the equities were with the defendant, and that the bill be dismissed. The court held that the decree, being absolute in its terms, must be considered a bar.

In Durant *v.* Essex Company, 7 Wall. 107, the circuit court made a decree on final hearing as to some of the defendants in favor of the complainant, who was dissatisfied with the relief accorded him, and declined to accept it. The court thereupon dismissed the bill. This decree being affirmed on appeal by a divided court, the complainant moved in the circuit court for leave to discontinue the suit, or that the bill be dismissed without prejudice, which motion was denied. The Supreme Court held that these proceedings constituted a bar to the maintenance of a new bill.

In one case in a United States circuit court,[21] the doctrine of Durant *v.* Essex Company was invoked to justify a plea of *res adjudicata*, based on an order noting the death and striking the name of one out of several defendants, on complainant's motion, before the taking of testimony was closed. It is doubtful if this case can be sustained on principle.

The earlier cases in the court of chancery of New York held that a complainant might get leave to dismiss his bill on payment of costs, before an interlocutory or final decree, without losing the right to begin his case over again,[22] and that a dismissal for failure to prosecute at the final hearing did not constitute a bar.[23] In a later case decided by the Court of Appeals,[24] however, the court held, Justice Bronson doubting, that a decree of dismissal where the cause had been set down for hearing after replication and an order closing the proofs, was a bar, although no proofs were in fact introduced, and the decree was taken by default at the hearing. The case of Byrne *v.* Frere, *supra*, was cited as authority, and Chancellor Kent's ruling in Rosse *v.* Rust was overruled. I cannot find that the authority of Ogsbury *v.* LaFarge has since been called in question in New York.

In Massachusetts the question was considered incidentally in

21 Howth *v.* Owens, 30 Fed. Rep. 910.
22 Cummins *v.* Bennett, 8 Paige 79.
23 Rosse *v.* Rust, 4 Johns. Ch. 300.
24 Ogsbury *v.* LaFarge, 2 N. Y. 113.

the case of Bigelow *v.* Winsor, 1 Gray 299, 301, where Chief Justice Shaw said:

"Sometimes, indeed, a party plaintiff in equity who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or non-suit, in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter 'dismissed without prejudice.' "

Later, the point was decided in Borrowscale *v.* Tuttle, 5 Allen 377. Here a bill to redeem, requiring an answer under oath, was dismissed on motion of the plaintiff, without the knowledge of the defendant, after answer, and after the expiration of the time allowed by the rules of the court for the plaintiff to file his replication. It was held that this decree must be conclusively presumed to have been upon the merits, and must be held a bar to a subsequent bill. The authority of this case, which was cited with approval by Judge Story,[25] does not appear to have been doubted, but in the later case of Kempton *v.* Burgess, 136 Mass. 192, the court made some remarks which seem to countenance a different theory. Here, before the hearing on the merits, the plaintiff moved for leave to discontinue, which motion was overruled, and a decree made dismissing the bill in general terms. On the plaintiff's appeal, the decree was ordered modified so that the bill should be dismissed without prejudice. Chief Justice Morton, in delivering the opinion, took occasion to say:

"If, at the time of the hearing, a plaintiff in equity is not ready to go on, and the court refuses to grant further time, he may move for an order dismissing his bill, which will be granted upon payment of the costs; if he does not do so, the defendant is not entitled to a decree upon the merits, but can only have the bill dismissed for want of prosecution, and such a dismissal, like a dismissal upon plaintiff's motion, is not a bar to a new bill." Borrowscale *v.* Tuttle does not seem to have been called to the attention of the court, though Foote *v.* Gibbs and Bigelow *v.* Winsor are cited with approval, together with Cummins *v.* Bennett, 8 Paige 79, whose authority was shaken, if not destroyed, by Ogsbury *v.* LaFarge. If the decree as it stood had been pleaded in another suit, a different question would have been raised. The distinction is clearly pointed out in a Kentucky case, where it was held that an absolute decree of dismissal for

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[25] Story Eq. Pl., § 793 *a*.

want of parties would be reversed and modified on appeal so as to read without prejudice, but that if not revised on appeal, it would be held a bar to another suit.[26]

The subsequent case of Bradley *v.* Bradley, 160 Mass. 258, treating of a decree on a libel for divorce, cited Borrowscale *v.* Tuttle with approval, the court thus stating the law of estoppels by decree:

"The entry 'Libel dismissed,' without the addition of the words 'without prejudice,' purports to be a final judgment upon the merits. It is a bar to any further proceedings upon the cause of action set out in the libel. In collateral proceedings it is not conclusive by way of estoppel, or as evidence, except upon matters actually tried and determined, but as a final disposition of that for which the suit was brought, it is, like a judgment by default, conclusive as well in regard to the matters which might have been pleaded as those which were formally put in issue."

In other States the decisions are not altogether in unison. In Michigan it was held [27] that an absolute decree of dismissal upon the plaintiff's consent, upon a hearing on pleadings and proofs, was a bar, the court saying that the effect of a voluntary dismissal of a complainant's bill was the same as an adverse one, if made upon the hearing, when the merits were involved.

In a case in Iowa [28] in which the Massachusetts cases were examined, the decree considered recited that the complainant's solicitors withdrew their appearance, and that the bill was dismissed upon the pleadings and proofs. This decree was held to be a bar.

In Mississippi the court said in one case: [29] "It is true that the complainant may, at any time before final decision by the chancellor, dismiss his bill, but if the dismissal is made after the cause is set down for final hearing, it will have the effect, unless otherwise ordered by the chancellor, of a dismissal on the merits, and may be pleaded in bar to another suit."

In a later case in the same State,[30] the decree showed that the case came on for final hearing, and the complainant failing to appear, on motion of the defendant the bill was dismissed. The court held here that the defendant might have submitted the cause for final hearing, in which case the decree would have been

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26 Thompson *v.* Clay, 3 T. B. Mon. 359, 16 Am. Dec. 108.

27 Edgar *v.* Buck, 65 Mich. 356.

28 Scully *v.* C. B. & Q. R. R., 46 Ia. 528.

29 Phillips *v.* Wormley, 58 Miss. 398.

30 Baird *v.* Bardwell, 60 Miss. 164.

a bar, but having moved to dismiss for want of prosecution, the decree was not a bar. The court refused to follow Byrne *v.* Frere and Ogsbury *v.* LaFarge.

In Vermont, in a case [31] citing the overruled case of Rosse *v.* Rust as one of its authorities, the court held that no bar was created by a decree which recited that the case being called to be heard on the merits, the solicitor for the orator appeared and declined a hearing, and thereupon it was ordered that the bill be dismissed.

In a recent Florida case,[32] where on the complainant's motion a decree of dismissal without prejudice was entered at the final hearing, the court refused to reverse the decree and make it absolute on the defendant's appeal, the special circumstances apparently contributing largely to the decision arrived at.

After looking over the field that we have hastily surveyed, it will be noticed what a very important part the words "without prejudice" play. It has been said in connection with propositions of compromise that there is no magic in these words, but as applied to decrees the observation loses force. A consideration of the various cases, if it does not lead to any definite conclusion as to universally applicable principles, at least points one moral, which all the cases tend to illustrate, and that is that the form of a decree of dismissal is worthy of the closest scrutiny and the most watchful care of counsel.

Thomas Mills Day, Jr.

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[31] Porter *v.* Vaughn, 26 Vt. 624.

[32] Robbins *v.* Hanbury, 37 Fla. 468.